

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

JOHN HENDRICKSON, REBECCA HIRT,
JUDITH FINN, ANN ANDERSON,
ELIZABETH MOONEY, ANN HURST, JANET
HAYS,

Petitioners,

v.

CITY OF KENMORE,

Respondent.

CASE No. 16-3-0002

ORDER FINDING COMPLIANCE

On November 28, 2017, the Board issued its Final Decision and Order (FDO) in this case. The Board found the City of Kenmore's (City) failure to demonstrate Best Available Science (BAS) in adopting an amendment to its Public Agency and Utility Exception to critical areas regulations violated the requirements of RCW 36.70A.172. The Board remanded Ordinance 16-0418 to the City for action to comply with the Growth Management Act (GMA) and imposed invalidity.

On June 13, 2017, the City filed its Statement of Action taken to Comply with Final Decision and Order (Statement). The Statement was supported by the declaration of City Attorney Dawn Reitan, received July 12, 2017. Petitioners did not file an Objection to a Finding of Compliance but John Hendrickson contacted the Growth Board on July 14, 2017¹ to request an opportunity to speak at the compliance hearing.²

¹ This was the Friday before the Monday morning compliance hearing.

² At the Compliance Hearing, the City complained that it had not been notified of the Petitioners' intent to speak and noted that under WAC 242-03-590(1), failure to brief an argument constitutes abandonment of the unbriefed issue.

1 Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic
2 compliance hearing on July 17, 2017. Board members Cheryl Pflug, Deb Eddy, and William
3 Roehl attended the hearing. John Hendrickson appeared *pro se* on behalf of the
4 petitioners. Respondent City appeared through its attorney, Dawn Reitan. Also present
5 telephonically were Laurie Anderson, City staff, and Petitioners Judith Finn, Janet Hayes,
6 and Rebecca Hirt.
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8 I. STANDARD OF REVIEW

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10 After the Board has entered a finding of noncompliance, the local jurisdiction is given
11 a period of time to adopt legislation to achieve compliance.³ After the period for compliance
12 has expired, the Board is required to hold a hearing to determine whether the local
13 jurisdiction has achieved compliance.⁴ The Board's role in compliance proceedings is not
14 identical to that during initial consideration of a Petition for Review. When the Board has
15 identified non-complying provisions of a local jurisdiction's plan or regulations, the
16 jurisdiction "is under an obligation to bring those provisions into compliance and to
17 demonstrate that fact to the Board."⁵
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19 In the compliance hearing, the burden is on the challenger to establish that the new
20 adoption is clearly erroneous. In order to find the City's action clearly erroneous, the Board
21 must be "left with the firm and definite conviction that a mistake has been made."⁶ Within
22 the framework of state goals and requirements, the Board must grant deference to local
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26 ³ RCW 36.70A.300(3)(b).

27 ⁴ RCW 36.70A.330(1) and (2).

28 ⁵ See RCW 36.70A.300(3)(b) and RCW 36.70A.330; "The issue in compliance proceedings is somewhat
29 different than it is during an original adoption. In compliance proceedings, the Board has identified an area of
30 the local jurisdiction's comprehensive plan or development regulations that do not comply with the GMA. The
31 local jurisdiction is under an obligation to bring those areas into compliance and demonstrate that fact to the
32 Board . . . While the ordinance that is adopted to cure non-compliance is entitled to a presumption of validity,
nevertheless, the local jurisdiction must still demonstrate to the Board that it has addressed the area of
noncompliance identified in the FDO." *Abenroth, et al. v. Skagit County*, GMHB No. 97-2-0060c, coordinated
with *Skagit County Growthwatch, et al. v. Skagit County*, GMHB No. 07-2-0002 (Order on Reconsideration,
January 21, 2009) at 4-6. (Emphasis added).

⁶ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 governments in how they plan for growth.⁷ Thus, during compliance proceedings the
2 burden remains on the petitioners to overcome the presumption of validity and demonstrate
3 that action taken by the City is clearly erroneous in light of the goals and requirements of the
4 GMA.⁸

5 However, the burden shifts where the Board has entered a determination of invalidity,
6 as in the present case. Under RCW 36.70A.320(4) a city “subject to a determination of
7 invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that
8 the ordinance or resolution it has enacted in response to the determination of invalidity will
9 no longer substantially interfere with the fulfillment of the goals of” the GMA. In *Wells v.*
10 *Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 667- 669, 997 P.2d
11 445 (2000), the court stated: “Where there has been an invalidity determination ... the
12 exception found in subsection (4) *shifts the burden*, on those provisions only, to the local
13 government.” (Emphasis added). Thus the City’s actions taken in response to an earlier
14 determination of invalidity “invoke the burden-shifting provisions of RCW 36.70A.320(4)”
15 with respect to fulfillment of GMA goals. *Id.*⁹

16 17 18 19 **II. DISCUSSION**

20 **The Remanded Issue**

21 Petitioners challenged adoption of Ordinance 16-0418 which amended the City’s
22 critical areas regulations modifying its Public Agency and Utility Exception (PAUE). The
23 Board determined that the City’s action failed to comply with the requirement of RCW
24 36.70A.172 because the City did not include BAS when it adopted the amendment without
25 (1) providing an analysis of the environmental impacts of amending its PAUE, (2) providing
26 a reasoned justification for departure from BAS, and/or (3) explaining how expanding the
27 kinds of projects exempted from critical area regulations could be done without impacting
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30 ⁷ RCW 36.70A.320(1).

31 ⁸ RCW 36.70A.320(2).

32 ⁹ See also, *Protect the Peninsula’s Future, et al. v. Clallam County*, GMHB Nos. 00-2-0008 and 01-2-0020
(Order on Invalidity, May 15, 2015); *Smith, Panesko, Lodge v Lewis County*, GMHB No. 98-2-0011c
(Compliance Hearing Order, July 13, 2000) at 8.

1 the functions and values of the critical areas. The Board remanded the Ordinance to be
2 brought into compliance and imposed invalidity.

3 4 **The City's Compliance Action**

5 The City adopted Resolution No. 17-295 on May 8, 2017, recognizing the Board's
6 invalidation of Ordinance 16-0418 and directing Staff to insure that the City's code publisher
7 removed the amendments adopted therein and restored the Kenmore Municipal Code
8 (KMC)¹⁰ to the predecessor version as it stood prior to the adoption of the invalidated
9 Ordinance.¹¹ Further, the City submits record evidence showing that the KMC has been
10 restored as directed by Resolution No. 17-295.¹² The City acknowledged that the Board's
11 invalidation nullified the amendments¹³ and stated that the Council anticipates a
12 comprehensive review of its critical areas regulation to include by BAS in 2018.¹⁴
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14 15 **Board Analysis**

16 The Board has previously held that a resolution restoring the *status quo ante* is a
17 "legislative action," as contemplated by the Board's rules,¹⁵ that satisfies the requirement for
18 city action¹⁶ to comply with the GMA.¹⁷ Resolution 17-295 recognizes that Ordinance 16-
19 0418 is null and unambiguously directs the City's critical area regulations be restored to the
20 form that existed prior to adoption of Ordinance 16-0418. The City has demonstrated that it
21 followed through with measures to insure clarity of its Code.
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26 ¹⁰ KMC 18.55.160.

27 ¹¹ Kenmore's Statement of Actions Taken to Comply (June 13, 2017) at 2; Resolution 17-295 at 2.

28 ¹² Declaration of Dawn Reitan (July 12, 2017) at 2; Compliance Index 13: Email from Steven Jones, Code
Publishing Company (June 8, 2017).

29 ¹³ *Id.*

30 ¹⁴ At the compliance hearing, Petitioners interpreted that portion of the City's Statement as reflecting an intent
to again adopt a PAUE that exempts several development projects from critical areas regulations. The City
31 responded that the Statement was meant to reflect the City's intent to address the Board's finding that the City
must include an analysis of environmental impacts using BAS when amending critical area regulations.

32 ¹⁵ WAC 242-03-590.

¹⁶ See RCW 36.70A.300(3)(b) and RCW 36.70A.302(7)(a).

¹⁷ *Aggaard IV*, GMHB No. 15-3-0001 (Order Finding Compliance, March 14, 2016) at 4.

The Board finds and concludes that the City has met its burden under RCW 36.70A.320(4) to show that its action no longer substantially interferes with the requirements of the GMA and that the City has achieved compliance with the GMA.

III. ORDER

Based upon review of the November 28, 2017, Final Decision and Order, the City of Kenmore's Statement of Actions Taken to Comply with Final Decision and Order, compliance exhibits, the Growth Management Act, prior Board orders and case law, having considered the arguments of the parties offered at the compliance hearing, and having deliberated on the matter, the Board Orders:

- By adopting Resolution No. 17-295, the City of Kenmore **complies** with the provisions of the GMA.
- Case No. 16-3-0002 is closed.

SO ORDERED this 19th of July, 2017.

Cheryl Pflug, Board Member

Deb Eddy, Board Member

William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹⁸

¹⁸ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.